

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADENA, INC., et al	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
CLIFFORD B. COHN ESQ., et al	:	
Defendants.	:	No. 00-3041

MEMORANDUM AND ORDER

J. M. KELLY, J.

NOVEMBER , 2001

Presently before the Court is the Motion To Dismiss Defendants' Counterclaims filed by Adena Inc., David Long, Donna Long, and Carolyn Long ("Plaintiffs"). On June 15, 2000, Plaintiffs filed suit against Clifford B. Cohn, Esq., Cohn & Associates, and Philippe Malecki ("Defendants") alleging various violations of RICO, breach of fiduciary duty, malpractice and civil conspiracy. This Court denied the Defendants' Motion To Dismiss on March 30, 2001. Subsequently, Defendants filed an Answer, also asserting multiple Counterclaims, including Breach of Contract (Count I), Quantum Meruit (Count II), Detrimental Reliance/Promissory Estoppel (Count III), Fraud (Count IV), Intentional Interference with Contract (Count V), Civil Conspiracy (Count VI), and Abuse of Process (Count VII). Plaintiffs now seek the following: (1) dismissal of Counterclaim Counts I, II, III, and V with prejudice; (2) stay of Counterclaim Counts III, IV, V and VI, pending resolution of similar allegations filed in state court or in the alternative,

enjoinment of state court proceedings; and (3) dismissal of Counterclaim Count VII. For the following reasons, Plaintiffs' Motion is granted in part and denied in part.

I. BACKGROUND

A bitter divorce, allegations of misuse of corporate funds, and disputes over attorney fees provide the background for this lawsuit. For the purposes of this Motion, following is a brief summary of the facts as alleged by the Defendants.

Plaintiffs David and Donna Long, after forming Adena Inc. ("Adena"), opened a Hermes store at the King of Prussia, on June 8, 1996. Defendant Philippe Malecki ("Malecki"), who was then married to David and Donna Long's daughter, Carolyn Long, was the majority shareholder of Adena and acted as the corporation's sole director, president, secretary and treasurer until December 3, 1998. David, Donna and Carolyn Long ("Longs") were the minority shareholders. Defendant Clifford Cohn, Esq. of Defendant Cohn Associates ("Cohn Defendants") acted both as Malecki's personal attorney and Corporate Counsel for Adena.

Following a series of differences, including a divorce from Carolyn Long, Malecki entered into a settlement agreement with the Longs. Among other things, Malecki resigned from Adena and transferred his stocks to the Longs. The agreement, which also included a release, provided that Adena was to pay an outstanding bill of \$20,000 counsel fees to the Cohn Defendants for legal

services rendered to the Corporation. Despite the agreement, Adena and the Longs refused to pay the attorney fees, contending much of those fees were incurred for Malecki's personal business.

After months of unsuccessful negotiations over the attorney fees, the Cohn Defendants filed a Petition to Compel Arbitration in June 1999 in the Philadelphia Court of Common Pleas. In addition, the Cohn Defendants filed a complaint against Adena and the Longs in the Philadelphia Court of Common Pleas. In the Amended Complaint, filed September 21, 1999, the Cohn Defendants asserted claims similar to the Counterclaims being asserted against Adena and the Longs in this federal action. Following negotiations, the Cohn Defendants agreed to withdraw the Common Pleas Complaint if Adena and the Longs agreed to submit the matter to the Fee Disputes Committee of the Philadelphia Bar Association.

The agreement to proceed to arbitration was finalized, however, disagreements as to the scope and extent of the arbitration arose and the Longs refused to proceed.¹ On June 15, 2000, Adena and the Longs filed this instant federal action, alleging Malecki and the Cohn Defendants engaged in various violations of the Federal Racketeer Influenced and Corrupt

¹The arbitration has been stayed pending the resolution of an appeal filed by Adena and the Longs in the Superior Court of Pennsylvania after the Court of common pleas found in favor of the Cohn Defendants.

Organizations Act ("RICO") and asserting various state common law claims, including breach of fiduciary duty and conspiracy. In addition, Cohn is separately accused of malpractice and Malecki is accused of conversion. On November 27, 2000, the Cohn Defendants reinstated their complaint against Adena and the Longs in the Philadelphia Court of Common Pleas.

II. STANDARD OF REVIEW

In a motion to dismiss, a court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 476 U.S. 69, 73 (1984)(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 271 (3d Cir. 1985). In considering a motion to dismiss, all allegations underlying the claim must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

III. DISCUSSION

A. Agreement to Arbitrate

Plaintiffs seek dismissal of the following Counterclaims with prejudice: Breach of Contract (Count I); Quantum Meruit (Count II); Detrimental Reliance/Promissory Estoppel (Count III); and Intentional Interference with Contract (Count V). Plaintiffs

argue that because these Counterclaims pertain to the recovery of Cohn Defendants' attorney fees, they are subject to a prior agreement between Adena and the Cohn Defendants to have the attorney fees issue arbitrated by the Fee Dispute Committee of the Philadelphia Bar Association.

There is no dispute over the offer and acceptance of this agreement. As agreed, the Cohn Defendants withdrew the Amended Complaint they filed in the Philadelphia Court of Common Pleas and withdrew Counts I and II with prejudice. Due to a vehement disagreement over the scope of the arbitration, however, the arbitration process came to a halt and the matter is currently on appeal before the Superior Court of Pennsylvania. On November 27, 2000, the Cohn Defendants reinstated the remaining state claims in the Philadelphia Court of Common Pleas previously withdrawn without prejudice.

The above facts, however, are not relevant to the Counterclaims asserted in this federal action. Even if the agreement to arbitrate extends to the same matters alleged in Counterclaim Counts I, II, III, and V, the agreement only covers the claims filed by the Cohn Defendants in the Philadelphia Court of Common Pleas. Both parties seem to be under the misapprehension that because the claims filed in the Philadelphia Court of Common Pleas and the Counterclaims asserted in this federal action are identical, the agreement to arbitrate also

extends to this instant federal case. That is not so. The only relevant fact here is that none of these matters to this date have been resolved in either forum. Absent re judicata issues, it is irrelevant that the Counterclaims asserted by the Cohn Defendants in this federal action are identical to the claims they asserted as plaintiffs in the Philadelphia Court of Common Pleas. Since there is no dispute that res judicata does not apply, Defendants in this action have the right to assert their Counterclaims in this federal action. Therefore, the Court will not dismiss Counterclaim Counts I, II, III, and V based on any prior agreement to arbitrate nearly identical state claims in a state forum.

B. Stay Of Counterclaim Counts III, IV, V and VI

Plaintiffs next argue that the Court should stay the following counts: Detrimental Reliance/Promissory Estoppel (Count III); Fraud against the Longs (Count IV); Intentional Interference with Contract (Count V); and Civil Conspiracy (Count VI). In the alternative, the Plaintiffs ask this Court to stay the parallel state court proceeding. The Plaintiffs make this request based on the fact that these Counts are identical to the claims reinstated against them by the Cohn Defendants in the Philadelphia Court of Common Pleas.

Generally, the pendency of a state court action is not a bar to parallel proceedings in a federal court even when the

proceedings concern the same matters. See Colorado River Water Conservation Dist. V. United States, 424 U.S. 800, 817 (1976).

Only in exceptional circumstances may federal courts abstain or stay the action pending the resolution of similar claims in state court. Id. at 819. The movant must demonstrate the clearest of justifications for abstention. See CFI of Wis., Inc. v. Wilfran Agricultural Indust., Inc., No. CIV. A. 99-1322, 1999 WL 994021, at *1 (E.D. Pa. Nov. 2, 1999).

A threshold requirement before considering abstention is that the pending state court proceeding and the federal court proceeding must involve the same or nearly identical claims and parties. Id. at *2 (citing Trent v. Dial Medical of Fla. Inc., 33 F.3d. 217, 224 (3d Cir. 1994)). There is no dispute that these counts are "in fact virtually identical." See Counterclaimant's Answer To Counterclaim Defs.' Mot. To Dismiss at 6. The parties are also substantially the same. Only Malecki is not a party to the suit filed in the Philadelphia Court of Common Pleas.

Once the threshold requirement of parallel proceeding is met, courts are to consider the following factors:

(1) Which court first assumed jurisdiction over property involved, if any; (2) Whether the federal forum is inconvenient; (3) The desirability of avoiding piecemeal litigation; (4) The order in which the respective courts retained jurisdiction; (5) Whether federal or state law applies; and (6) Whether the state court proceedings would adequately protect the federal plaintiff's rights.

SEPTA v. Bd. of Revision of the City of Philadelphia, 49 F. Supp. 2d 778, 782 (E.D. Pa. 1999)(citing Trent, 33 F.3d at 225). This list is not a mechanical checklist; rather, courts are to "carefully balance the above factors," while remembering that "the balance [is] weighted in favor of the exercise of jurisdiction." Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp., 460 U.S. 1, 16 (1983).

Here, there are no exceptional reasons warranting a stay. The following factors do not favor staying of the Counterclaims: (1) this case does not involve property; (2) both the state and federal forum are convenient to the parties; and (3) the claims involve state law but federal courts are competent to hear state claims. The only factor that weighs in favor of stay is that the claims in the Philadelphia Court of Common Pleas were reinstated in November 2000 and the Counterclaims were subsequently asserted in April 2001. This timing factor, however, is de minimus, considering the balance and absent any evidence by the movant that the Philadelphia Court of Common Pleas case has progressed far more extensively than this instant case.

As for the avoidance of piecemeal litigation, as long as both parties insist on proceeding with their respective cases, there may be no avoiding piecemeal litigation. Assuming the

Counterclaims are compulsory,² it would be more efficient for this Court to resolve all of the claims since they involve the same nucleus of operative facts. Since the state action will proceed regardless of whether this Court stays the counts in this federal action, however, neither duplicative nor piecemeal litigation may be avoided by this Court's stay. In any case, abstention must be grounded in more than just an interest in avoiding duplicative litigation. CFI of Wis., 1999 WL 994021 at *3 (citation omitted).

In the alternative, Plaintiffs have requested that this court enjoin the parallel state court proceeding. Generally, federal courts may not enjoin on-going state proceedings, absent exceptional circumstances as provided by exceptions to the Anti-Injunction Act. See 28 U.S.C. § 2283 (1994); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engrs., 398 U.S. 281, 286-87 (1970). Plaintiffs here do not even make an attempt to overcome the prohibitions of the Anti-Injunction nor do the facts of this case meet any of the exceptions. As such, Plaintiffs' request for enjoinder of parallel state court proceeding is summarily denied.

C. Abuse of Process (Count VII)

Plaintiffs argue Count VII is not a pendent state claim and

²The Plaintiffs have not addressed whether the Counterclaims asserted by the Cohn Defendants are in fact compulsory or merely permissive.

that it should be resolved under Federal Rule of Civil Procedure 11. Currently, there is no Rule 11 motion pending. The Court will assume, despite the Plaintiffs' lack of clarity, that they are arguing this Counterclaim is not compulsory but rather a permissive counterclaim lacking an independent basis of jurisdiction.

The Counterclaim of abuse of process has no independent jurisdictional basis³ since there is no federal common law of abuse of process. Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). Additionally, the parties lack complete diversity. Because there is no federal question nor diversity jurisdiction, the Court may only hear the abuse of process counterclaim under supplemental jurisdiction. Under supplemental jurisdiction, federal courts may hear state law based counterclaims if they arise out of the same transaction or occurrence as the anchor federal claim or claims. 28 U.S.C. § 1367.

Under Federal Rule of Civil Procedure 13, only counterclaims

³ Plaintiffs wrongfully cite Thomason v. Leherer P.C., 183 F.R.D. 161 (1998) to support dismissal. In Thomason, the court held that in a case where the allegation of abuse of process arose from a case initiated in federal court, the abuse of process claim had to be resolved in federal court even where the federal court had dismissed the underlying case based on lack of federal question. See Thomason, 183 F.R.D. at 163-4. Federal courts retain jurisdiction to determine whether attorneys who appear before federal courts abused the federal judiciary system for improper purposes. Id. at 169. Here, however, the abuse of process claim has been asserted against the individual plaintiffs, not the lawyer. As such, Thomason is inapplicable.

which arise out of the same transaction or occurrence as the subject matter of the opposing party's claims are compulsory. Any other counterclaims are merely permissive and require an independent jurisdictional basis. See Reitz v. Dieter, 840 F. Supp. 353, 355 (E.D. Pa. 1993)(citations omitted). Counterclaims for abuse of process do not arise out of the same transaction or occurrence as the underlying claim. ATX Telecommunications Serv. v. U.S. Wats, Civ. A. No. 92-3328, 1993 WL 30076 at *1-2 (E.D. Pa. 1993). As such, this Court does not have supplemental jurisdiction over the Counterclaim of abuse of process and Counterclaim Count VII must be dismissed for lack of subject matter jurisdiction.

Accordingly, Plaintiff's Motion To Dismiss Defendants' Counterclaim Counts I, II, III and V is denied. Plaintiffs' Motion to Stay and in the alternative, to enjoin parallel state court proceedings is denied. Plaintiffs' motion to dismiss abuse of process claims is granted.

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O R D E R

AND NOW, this day of NOVEMBER, 2001, in consideration of the Motion To Dismiss Defendants' Counterclaims (Doc. No. 29) filed by Adena Inc., David Long, Donna Long, and Carolyn Long ("Plaintiffs") and the Response of the Defendants Clifford B. Cohn, Esq., Cohn & Associates, and Philippe Malecki ("Defendants") thereto, it is **ORDERED**:

1. The Plaintiffs' motion to dismiss Counterclaim Counts I, II, III, and V with prejudice is **DENIED**.

2. The Plaintiffs' motion for Stay of Counterclaim Counts III, IV, V and VI, pending resolution of parallel state court proceedings or in the alternative, enjoinder of state court proceedings is **DENIED**.

3. The Plaintiffs' motion to dismiss Counterclaim Count VII is **GRANTED**. Defendants' Counterclaim Count VII is **DISMISSED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.